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No. 2639.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PABST BREWING COMPANY,
a Corporation,
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY,
a Corporation,
Defendant in Error.

Petition of Defendant in Error for Rehearing and Modification of Opinion.

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Attorneys for Defendant in Error.

Filed this ..... day of ..... 1916.

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

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To the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and to the Honorable William B. Gilbert, Erskine M. Ross and Frank H. Rudkin, Judges of Said Court:

The defendant in error deeming itself to be aggrieved by error in the decision of this court, filed February 21, 1916, and its rights upon a new trial to be prejudiced by said error, respectfully presents the following particulars wherein it conceives such decision to be erroneous and incorrect in law, and respectfully asks for a rehearing upon such grounds, or if the Court be unwilling to grant a rehearing, that its opinion be modified as herein after prayed.

I.

The rule of damages announced by the Court is in conflict with the authorities. No point was made in

the brief or argument that the rule of damages given by the trial judge was erroneous. No exception was taken by the charge on this subject.

If the rule given in the charge by the trial judge and not excepted to is claimed not to be correct, the defendant in error should have the opportunity of arguing the question.

The trial court gave this rule of damages:

> "If the time for delivery extends over a period of time, then for the purpose of fixing damages the market value to be considered is that of the last day of the period under which delivery may be made under the contract." (Trans. p. 375.)

And again:

> "The rule of damages for a breach of contract by a renunciation of it before the day of performance arrives, is the amount that the injured party suffers by the continued breach down to the time of performance is due, less any abatement by reason of steps by the injured party to protect himself, which the law requires him to take. That is, if you find that the defendant was not justified in refusing to accept the hops in question, the plaintiff is entitled to such damages as will justly represent the amount of this loss, between the date of repudiation of the contract and the time in which it had to make complete delivery of the hops, less the amount he would save by reasonably prompt disposition of the hops to others, at the best price to be obtained as hereinafter stated, such damage not to exceed the amount demanded in the complaint, which amount I believe is $32,000,00." (Trans. p. 373.)

As stated, no exception was taken to this part of the charge, and no point was made in the briefs or argument that the rule was not correctly stated.

The Circuit Court of Appeals in its opinion states:

> "In this case the measure of damages was the difference between the contract price and the market price at *the time and place of delivery,* because there was no allegation in the complaint that the hops were resold, or of the price at which they were resold. In other words, the action was not brought to recover the difference between the contract price and the selling price, with expenses added; but to recover general damages, and the law fixes these at the difference between the contract price and the market price at the time and place of delivery."

This Court again states:

> "The contract in suit was canceled by the Brewing Company on the 4th day of November, 1912, and the complaint alleged a tender of performance which must have been made at or about that time. The only purpose of fixing the date of delivery would be to *fix a date for the ascertainment of the market price,* and under the circumstances of this case that date should be *fixed as of November 4th, 1912, or soon thereafter."*

This Court in its opinion states that the complaint alleges a tender of performance which it says must have been made at or about the 4th of November, 1912.

In the first paragraph quoted above from this

Court's opinion, the Court correctly states the rules of damages, but in the second paragraph quoted the Court states that the damages are to be fixed, not by the market value at the time of delivery, but by the market value at the time of the renunciation of the contract by the Brewing Company on November 4, 1912, or soon thereafter.

As no point was raised by the plaintiff in error as to the rule of damages, the instructions given by the trial court should remain as the law of the case. The matter was not referred to in our brief because not mentioned by the other side. If it be urged that the instructions given by the trial court are erroneous, we should have the opportunity of arguing the proposition.

By consent of all parties the case was tried on the theory, not that the hops in gross were tendered, but that samples were submitted and the *samples* tendered by plaintiff below were rejected and the defendant below repudiated the contract.

The Court instructed the jury that,

> "While this contract did not by its terms, require plaintiff to submit samples of hops prior to delivery, the evidence shows *without conflict* that the parties by their acts so construed it, and it therefore became one of the terms of the contract." (Trans. p. 360.)

This was in accordance with the allegation of defendant's answer which, after stating that a contract proposed by defendant below was not signed, alleged that,

> "Immediately thereafter and in the said month of September, 1911, the defendant in writing informed the plaintiff that defendant's understanding of any contract between the plaintiff and defendant in relation to the said hops was that shipments and deliveries of said hops should be made by the plaintiff to defendant during the months of *October, November* and *December* of *1912,* and *January* and *February* of *1913,* and that samples of any hops which the plaintiff should offer for delivery to defendant in pursuance of the aforesaid telegraphic offers and acceptances should and must be submitted by plaintiff to defendant and be approved by the defendant *before shipments and deliveries should be made;* that the plaintiff accepted to and agreed to defendant's interpretation and understanding of the said telegraphic orders and acceptances," etc. (Trans. p. 20.)

Defendant then alleges that it procured samples which it submitted to plaintiff, and informed plaintiff that it would be willing to accept and purchase two thousand bales of choice Cosumnes hops from the defendant, if the same were in all things equal in quality to the samples submitted. (Trans. p. 29.)

The answer then alleges:

> "That the plaintiff never did procure or offer or deliver to the defendant any choice Cosumnes hops or any hops equal in quality to the samples submitted by defendant to plaintiff as aforesaid, and has never at any time delivered or offered to deliver any choice Cosumnes hops of the crop of 1912, *or any hops of the crop of 1912.*" (Trans. pp. 29-30.)

While the complaint alleged that the plaintiff did offer and tender to the defendant two thousand bales of hops, this is not to be understood that the plaintiff segregated two thousand bales of hops and tendered these identical two thousand bales to defendant, but that the contract was a sale by samples. This was the theory of the defendant below, and the case was tried on that theory by consent of both parties. The plaintiff submitted samples in the first place which the defendant rejected. The defendant then submitted samples, saying it would accept hops equal to such samples.

The plaintiff then submitted samples of hops which it claimed were equal to or better than those submitted by defendant, and offered to make delivery if such samples were acceptable.

Defendant then repudiated the contract on November 4th. Plaintiff had, according to defendant's theory, not only the whole month of November, but also December, January and February in which to perform.

Delivery in bulk was not tendered, but delivery by samples was, and the plaintiff below under any phase of the pleadings or evidence had several months after the repudiation of the contract in which to perform. But even if this were not so the case was tried on that theory.

This Court assumes that the hops were tendered on November 4, 1912. The evidence showed that the renunciation of the contract by the Brewing Company excused an actual tender.

The allegation of tender was disregarded by both parties, and the theory upon which the case was tried was that there had been no tender. There was no segregation of the 2000 bales of hops, nor was it claimed that there had been such a segregation.

No different theory was argued in briefs of counsel. If such argument had been made it could not be considered because in the Federal Court, in actions at law, only questions presented by the trial court will be reviewed by an appellate court; and when a cause is tried upon an issue or theory presented by one of the parties in the trial court, that party will not be permitted in the appellate court to present a different issue or theory for its consideration.

> *Hatcher v. Northwestern Nat. Ins. Co.,* 184 Fed. 23, 106 C. C. A. 220.

In actions at law the function of the Circuit Court of Appeals is exclusively the correction of errors below, and questions which were not presented nor decided by the trial court are not open for review.

> *Clark v. City of Pittsburg,* 146 Fed. 441; affirmed 154 Fed. 464.

Where parties, with the assent of the Court, unite in trying a case on the theory that a certain matter is within the issues, they cannot depart therefrom on appeal.

> *Missouri K. & T. Ry. Co. v. Wilhoit,* 160 Fed. 440.

According to plaintiff's theory it had, if it established the custom it claimed, until the end of the shipping season, and at any event had a reasonable time after November 4th to perform.

Under the contract the plaintiff company had the right to go out in the market and purchase hops equal to the samples submitted by defendant. Plaintiff company was a *dealer* in hops as well as a grower.

The defendant in submitting samples of hops which it would accept did not confine itself to hops grown by plaintiff company, but agreed to accept any hops equal in quality to the samples submitted.

On the question of custom, the only point that could be made was one of fact. No point is made in the brief that the testimony is inadmissible. The only point made in the brief that the custom was proven by only one witness. (See brief plaintiff in error, page 169.)

This then was a question of fact before the jury. But for our present purposes we may omit this evidence altogether. It is plain by defendant's answer that the plaintiff had November, December, January and February for delivery.

The evidence of custom as to time of delivery is mentioned in the brief of Pabst Company (p. 169), only to attack its sufficiency as proof of a binding custom. This, of course, was a question for the jury; but the relevancy of a custom fixing the time of delivery, as determining the time at which to fix value,

is now questioned for the first time in what we submit is an inadvertent and mistaken statement in the opinion of this Court.

2. If this petition of a rehearing be not granted, the theory of the trial court and of both parties to the controversy may be overturned, to the serious prejudice of the Horst Company, without its being given an opportunity to be heard on the question. And we urge upon the Court a reconsideration of the question of damages because, if the intimation to which reference has been made is not merely based on an inadvertent assumption that the hops were tendered on November 4th, it violates well settled rules of law and is in direct conflict with repeated decisions of both Federal and state courts.

The contract in suit was made in 1911 for the sale of hops of the crop of 1912. The Horst Company offered proof of a trade custom which would fix the time of delivery as a period from harvest time in 1912 to March 1st, 1913. The Brewing Company claimed that the contract had been modified so as to allow the delivery from September to December, 1912. In either case the time for delivery had not expired when the Brewing Company cancelled the contract on November 4th, 1912. In any event, the seller would have a reasonable time after the harvesting of the crop, which might have extended beyond the date of the attempted cancellation.

We have therefore a case of an executory contract

of sale, repudiated by the buyer before the time for delivery had expired. If the repudiation was wrongful, our position is

(a) that the seller could claim as damages the difference between the contract price and the market price as of the time specified in the contract for delivery;

(b) that if the contract is silent as to time of delivery, the seller may show that a trade custom fixed the time of delivery; and that in such case, the custom becomes a part of the contract as surely as if the accustomed time had been expressly incorporated therein; and finally,

(c) that if the contract, either expressly or by custom incorporated therein, allows a period of time for delivery, damages are fixed as of the last day of delivery.

3. *The rule of damages announced by the Appellate Court is in conflict with the authorities.*

The proper rule of damages in this case of an anticipatory breach of a contract of sale is stated as follows in Sedgwick on Damages.

> "In England and most of the United States, the repudiation of a contract by one of the parties to it before the time for performance has arrived amounts to a tender of a breach of the contract; and if it is accepted as such by the other party it constitutes a so-called 'anticipatory breach,' and the injured party is at liberty to begin suit at once and to recover entire damages (citing cases). The damages are to be assessed, of course, as of the date of the breach; nevertheless, they are to be a compensation for

the loss caused by depriving the plaintiff of the benefit of the contract as it was originally made. The doctrine of anticipatory breach is not a doctrine which fictitiously moves the performance ahead to the time of the repudiation, and regards the repudiation as a failure to perform the contract. The anticipatory breach takes effect as a premature destruction of the contract rather than as a failure to perform it in its terms. The damage caused by such a premature destruction is, to be sure, due to the consequent failure to secure performance; but this is a failure to secure performance according to its original terms, that is, performance at the time and place when performance was required according to the terms of the agreement. Since the injury is the destruction of the contract, regarded as an article of property, the measure of damages is the value of such article at the time of its destruction; but since the value of a contract will ordinarily be determined by the benefit which its performance would confer, *the exact measure of damages upon an anticipatory breach is in the ordinary case precisely the same as it would be if the repudiation were not accepted as a breach and the injured party brought suit, after the time of performance, for the non-performance of the time set.* In other words, though the plaintiff sues at once for an anticipatory breach of the contract, his damages are to be assessed according to the cost of performance, not at the time and place of the breach, but at the time and place set for performance.

"Thus in the leading case of Roper v. Johnson (L. R. 8 C. P. 167), it appeared that a contract by the defendant to deliver certain goods had been repudiated by him before the time for performance, and that this repudiation had been accepted as a breach by the plaintiff, who brought suit at once. The court held that the measure

of damages was the difference between the contract price and the market value at the time of performance. So in the case of Roehm v. Horst (178 U. S. 1), where the purchaser repudiated a contract of sale before the time for delivery and the seller brought suit at once, it was held that the basis of damages in the absence of special circumstances was the cost of performance at the time fixed therefor by the contract." (Sedgwick on Damages, 9th ed., sec. 636 d.)

And the author then proceeds to discuss the evidence of the value at the time for performance, saying:

"Where the trial of the action is not had until after the time fixed by the contract for performance this rule will not result in any uncertainty as to the amount of damages; for market values at the time fixed for performance can be shown, and the amount of damages is therefore no more uncertain than it would have been if suit had been brought after the time fixed for performance. If, however, suit is brought and actually comes to trial before the time fixed for performance, there is an element of uncertainty, because the jury can tell only by conjecture what would be the actual cost of performance at the time set therefor. This, however, should be regarded as no objection to the application of the ordinary rule of damages. It is true that in such a case values at the time of breach, or rather at the time of trial, will be introduced in evidence and will probably form the basis upon which the jury will find the values at the date for performance; but such actual values are introduced in evidence not because values at the time of breach are of any importance in them-

> selves, but merely as evidence to prove the probable values at the time of performance." (Sedgwick on Damages, 9th ed., sec. 636e.)

In the present case the suit was brought, and the trial had, *after* the expiration of the time for performance, and consequently the value at the time of the repudiation on November 4th were not necessary in order to determine the value at the time for delivery. Yet the opinion of the Court, if allowed to stand in its present form, may prevent proof of custom showing when delivery was due, and confine us to the question of value at the time of the breach—a question which is immaterial under the above stated rule.

The leading case on the subject of anticipatory breach, also a case involving a hop contract, under which the buyer was in default, is *Roehm v. Horst,* 178 U. S. 1, 44 L. ed. 953. There the trial was had before the time for delivery arrived, yet the Supreme Court of the United States said:

> "As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party *down to the time of complete performance,* less any abatement by reason of circumstances of which he ought reasonably to have availed himself."

In direct violation of this rule, the opinion in this case holds that the seller is to be denied his damages "down to the time of complete performance," and is

to be confined to the damages he would have sustained had delivery been due November 4th, 1912, and had a tender been refused on that day.

In the Roehm case, the market price at the fututre time of delivery was incapable of ascertainment, and the Court therefore allowed the seller the difference between the contract price and the price at which hops could be resold for delivery at the same future time of delivery. But in the present case, the price at the time of delivery could have been proved and was proved.

Another case involving a sale of hops is *Krebs Hop Co. v. Livesly,* 114 Pac. 948, where the opinion was written by Judge Bean, who is now United States District Judge in Oregon. There also the purchaser had repudiated liability before the time for delivery, and it was held that

> "the rule of damages is the difference between the contract price and the market or current value of the property at the time and place of delivery",

and further that

> "notice from the buyer to the seller, before the day of delivery, that he will not receive the property does not affect this rule unless the seller upon receiving such notice should elect to terminate the contract."

This decision quotes from the case of *Cherry Valley Iron Works v. Florence Iron River Company,* 64 Fed. 569, 575, to which reference is also made in the opin-

ion in the present case, although in another connection. The Cherry Valley case holds that where the property has not been separated from the mines in the seller's possession, and where title has not passed, the measure of damages for the buyer's renunciation of the contract is the difference between the contract price and the market price *at the times when the several installments should have been delivered.*

Skeele Coal Co. v. Arnold, 200 Fed. 393, a case in the second circuit, involved a claim of a seller for damages for the buyer's repudiation of a contract of sale. The contract was to sell 100,000 tons of coal, deliverable in equal monthly installments between April 1, 1909, and April 1, 1910. Early in April, 1909, the buyer repudiated the contract. The Court said:

> "The question to be determined is the proper measure of the Meriden Company's damages. As the purpose of the law is compensation, the Meriden Company should be put as far as possible in the same position it would have been in if the contract had been carried out. It could have brought suit to recover its entire damages in May, 1909, when it acquiesced in the Skeele Company's repudiation of the contract. Dingley v. Oler, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984. It ought to have disposed of its coal to other parties, it being a single article, at the market price, if that exceeded the cost of production. The measure of damages would then have been the difference between the contract price and the market price for coal *to be delivered in the future under a contract as similar to the*

> *repudiated contract as it could obtain.* However, it elected, as it had a right to do, to bring suit after the term of the contract had expired. At that time it was possible to show the market price of coal for each month of the term of the contract."

The decision of the Circuit Court of Appeals of the Second Circuit in *Skeele Coal Co. v. Arnold* is directly applicable to the facts of the present case. Just as in that case the price to be considered was not that of April, 1909, the date of repudiation, but rather that of the times fixed for the delivery of the coal —so here the damages should be determined not by the value on November 4th, but by the value at the time for delivery, which was fixed as definitely by custom as if the contract had expressly provided for delivery at any time before March 1st, 1913.

The same rule was again applied in *Stephen M. Weld & Co. v. Victory Mfg. Co.,* 205 Fed. 770, 783, where the Court quotes with approval the statement that "the date at which the contract is considered to have been broken *is that at which the goods were to have been delivered, and not that at which the buyer may give notice that he intends to break the contract, and to refuse to accept the goods.*" Benjamin on Sales, Sec. 1012.

After thoroughly discussing the question, the Court holds that a seller is entitled to damage as of the time set for performance, even though a repudiation has occurred at an earlier time.

The rule fixing the damages as of the time for delivery (as distinguished from the time of renunciation) was enforced by the Circuit Court of Appeals for the Fifth Circuit in

Southern Oil Co. v. Heflin, 99 Fed. 339;

And also in the following cases:

Kadish v. Young, 108 Ill. 170, 48 Am. Rep. 548;
Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436;
Poel v. Brunswick Co., 144 N. Y. Supp. 725;
Lee v. Briggs, 99 Mich. 487, 58 N. W. 477;
Missouri Furnace Co. v. Cochran, 8 Fed. 463;

And is stated to be the settled law in Williston on Sales, Sec. 587. Upon a repudiation before performance, the other contracting party is not bound to buy or sell before the time set for performance, for the purpose of possibly reducing the damages.

York Mercantile Co. v. Lusk, 6 Kan. App. 629, 49 Pac. 788.

Some of the cases intimate that a different rule might be applied where suit is brought before the time for delivery has expired, and the seller thus accepts the renunciation as a breach. This is not the view taken by the Supreme Court in *Roehm v. Horst,* 178 U. S. 1; but whatever might be the rule in such a situation, in the present case the Horst Company did not bring suit until the full time for performance had expired. Moreover, in reply to the telegram of repu-

diation, it answered that it could not consent to the cancellation until the payment of the loss sustained (Trans. p. 58), which offer the Brewing Company declined (Trans. p. 59). As the situation of the parties was thus fixed, the Horst Company had the right, at any time before the period allowed for delivery expired, to tender the hops, either from those on hand or from any that it might acquire by purchase or repurchase. Of course, so long as the repudiation was not retracted, no actual tender was necessary.

> *Sedgwick on Damages,* Sec. 636a and cases cited.

Under the foregoing authorities, the evidence of custom was highly relevant. If the jury was satisfied that such a custom existed, it became incorporated in the contract, and the situation was identically the same as if the contract had specified the time for delivery as being that of the shipping season, from the harvest time to the following March.

The authorities also support the instruction given to the jury that "if the time for delivery extends over a period of time, then for the purpose of fixing damages the market value to be considered is that of the *last day of the period under which delivery may be made under the contract.*"

> *J. P. Gentry Co. v. Margolius Co.,* 75 S. W. 959;
> *Scruggs v. Riddle,* 54 So. 641;
> *Hill v. Chapman,* 59 Wis. 211, 18 N. W. 160.

In a suit by the seller, it is proper to fix damages as of the last day of the time allowed for delivery, *although the price steadily declined during the month.*

C. W. Hull Co. v. Marquette Mfg. Co., 208 Fed. 260.

The ruling which excludes evidence of custom, and also evidence of value later than November, if allowed to stand, not only may seriously prejudice the Horst Company upon a retrial, but it is clearly contrary to the well settled law on the subject, and to the decisions of the Supreme Court of the United States, and other Federal courts. We therefore ask for a rehearing, in order that the question of damages may be fully discussed and passed upon; or, in any event, that the opinion be modified so as to change the rule of damages which it apparently indicates to be the proper one.

4. If the question of the measure of damages is to be reconsidered, as we submit it should, and the law on that subject stated for the purposes of a second trial, we desire to call the Court's attention to the fact that there was no real "market value" for 2,000 bales of hops at any time from November, 1912, to March, 1913; that this quantity could only be disposed of at that particular time by personal solicitation; and that therefore the damages should be based on the best price obtainable for the hops by

the seller, rather than on any market price, at least if the jury believed the evidence to show an absence of market value.

We call particular attention to the following testimony, given by Mr. E. Clemens Horst, the President of the Horst Company:

> "Q. Are you familiar with the prices that could be obtained or were obtained in November 4th, 1912, down to and including, say, the first day of March, 1913? A. Yes, sir. Choice air-dried Cosumnes hops could not be sold in that quantity at any price. Because the buying season is over about the middle of October, the beginning of October, the season is practically over, and after that time it is simply a retail trade. I do not know just how many hops were left in the Cosumnes district at that time. I believe a few hundred bales were left over. Sacramento would be the nearest market, the most of the business would be done in Sacramento hops in Sacramento. It would not be possible to market that quantity of hops in Sacramento at that time at a profit. There is really no such thing as a market price for hops, because hops are sold on private contract, and are sold in advance." (Trans. pp. 71, 72.)

Again the same witness testifies (Trans. p. 73):

> "The market was declining very rapidly from November 4th, down to and including the first day of March. It is not possible to sell 2,000 bales of one kind of hops on a declining market."

On being asked what price could be obtained for 2,000 bales of choice air-dried Cosumnes hops at the end of February, 1913, the witness answered (Trans. p. 79):

> "You could not sell that quantity, no matter what you took, unless you took some slaughtering figure."

It will be noted also that the Horst Company, writing to the Brewing Company on October 18th, 1912, states this situation clearly:

> "You no doubt realize that 2,000 bales of hops is an enormous block of hops to sell at any time of the year and at a time as late as this it is always much harder to sell California hops and there is an enormous difference between the price at which anyone in the hop business would buy 2,000 bales and the price at which he would sell 2,000 bales, unless, of course, the purchase was being made without speculation against a concurrent sale or offer."

The 2,000 bales represented about 400,000 pounds (there are 200 pounds to a bale, trans. p. 74). "They could not possibly be sold in one lot, because 2,000 bales is an enormous quantity of hops." (Trans. p. 74.) The total hop production of the entire United States in 1912 was 55,800,000 pounds, and it was a year of greater production than usual (Trans. p. 131). Before the repudiation of November 4th, the buying season had expired, and the brewers being generally supplied, all that was left was the chance of seeking out occasional buyers for small lots of the hops. For these reasons, and because "hops are sold on private contract, and are sold in advance. (Trans. p. 72), there is no such thing as a market price for hops, especially where the hops are left on the seller's hands in a large quantity when the buying season has expired.

It is true that the Brewing Company introduced some evidence tending to contradict the foregoing statements, but the Horst Company was entitled to go to the jury upon the question; and if the jury should find that hops were not readily marketable in the quantity involved, and that there was no generally established market price, it is submitted that the Horst Company would be entitled to the difference between the contract price and the best price obtainable for that amount of hops. Such is the general law upon the subject.

Salem Iron Co. v. Lake Superior Mines, 112 Fed. 239, 245;
Todd v. Gamble, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225.

Moreover, the measure of damages is settled by sections 3311 and 3353 of the Civil Code of California, providing as follows:

> 3311. The detriment caused by the breach of a buyer's agreement to accept any pay for personal property, the title to which is not vested in him, is deemed to be: . . . 2. If the property has not been resold in the manner prescribed by sec. 3049, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expense properly incurred in carrying the goods to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it.
>
> 3353. In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it

> should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale.

These sections are applicable in a proper case to the cases arising in the Federal courts.

> *California Canneries Co. v. Pacific Sheet Metal Works,* 144 Fed. 886.

If, therefore, the measure of damages is to be passed upon on this writ of error, the Horst Company should not be confined to a market price which did not exist for the quantity of hops in question; but is entitled to the difference between the contract price and the best price obtainable by it, and that "market price" should not be considered in the ascertainment of the damages if, as a matter of fact, there was no market for the quantity of goods involved at the time of delivery.

Where there is no available market at the time and place for delivery, market value is not ascertained strictly as of such time and place, but reasonable latitude is given in ascertaining it.

> *Redhead Bros. v. Wyoming Cattle Inv. Co.,* (Iowa), 102 N. W. 144, 147,

which case declares this to be particularly applicable where the seller does not exercise his right to sell for the buyer's account.

The rule of damages for repudiation in the Federal Courts when there is no open market at the time and

place for delivery is stated in the 5th syllabus of *Salem Iron Co. v. Lake Superior Consol. Iron Mines,* 112 Fed. 239 (50 C. C. A. 213), which syllabus correctly represents the decision found on page 245. We quote:

> "5. Damages—Breach of Contract—Questions for Jury.
>
> Where a contract for the sale and purchase of iron ore was repudiated by the purchaser before delivery had been completed, but after the seller had the ore on hand ready for delivery, and because of the close of the season there was at the time no open market for the ore remaining undelivered, the difference between the contract price and the best offer which could be obtained for it may be taken as a fair measure of the seller's damages in an action for breach of the contract; the testimony as to such offer, however, to be submitted to the jury to be considered by them in connection with any other evidence bearing on the question of the value of the ore at the time of the breach."

5. The opinion states that:

> "There is no testimony tending to show that it (Horst Co.) could at any time tender or deliver hops of a quality superior to the samples. Indeed, all the testimony is clearly to the contrary."

The ability of Horst Company to make delivery satisfying the terms of the contract was not put in issue by the pleading or at the trial, and no question on that point was argued in the briefs. The verdict for the Horst Company must have found all neces-

sary facts in its favor. Therefore, it found the Horst Company to have done all that it was bound to do under the contract to be free from any default. No question was saved as to sufficiency of evidence to sustain this verdict and, hence, language above quoted from opinion intimates, if it does not hold, that proof failed in a particular not questioned by plaintiff in error. Such a vital question should be left open on the new trial unprejudiced by any judicial expression until it is fairly raised and argued.

II.

As to the books and selling expense.

This Court predicates its opinion upon the basis that as the repudiation of the contract occurred on November 4, 1912, the damages are confined to the difference in price between that prevailing at or about that time and the contract price. This is upon the theory that the whole two thousand bales had to be delivered at that time. This was not the theory on which the case was tried in the court below. The theory on which the case was tried was that no delivery was to be made until the samples had been approved, and not even then all at one time, but at different times—as late as February, 1913, according to defendant's theory, and, according to ours, as late as the end of the shipping season, and certainly at any time within a reasonable time.

It must be remembered that the evidence shows

that there is no market for hops like there is for wheat or other standard products, but that hops are sold by solicitors by private contract and in the best way that various changing conditions permit. Even Mr. Drescher, witness for the Brewing Company, admitted that he would place the hops in the hands of the brokers in the different markets to draw from. Some in Chicago, New York, Boston, Milwaukee and St. Louis (trans. p. 97).

This Court in its opinion states:

> "No doubt evidence of sales made by the Horst Company of these hops within a reasonable time after breach of the contract would be competent as bearing upon the question of market value; but the testimony offered showed sales made in April, May and June of 1913, and one as late as July 19th. It must be self-evident that a sale of hops made in July is no evidence whatever of market value six or eight months previously, especially in view of the testimony on the part of the Horst Company that the price of hops declined rapidly after November 4th, the date of the cancellation of the contract. Furthermore, the market value or price at Milwaukee, the place of delivery, was the criterion, and these sales were made in many different states, and even in the Dominion of Canada. For these reasons the testimony offered was incompetent and irrelevant and should have been excluded."

No point was made in the briefs or argument that the instruction of the Court as to the market price or market place was incorrect. The Court instructed the jury that if the plaintiff company

> "had such hops on hand, it could sell them at the best market price obtainable at the time and place of delivery; if there was no market price at the time and place of delivery, then at the market price at the *nearest market* for such commodity, or if there was *no existing market price,* then at the best price obtainable." (Trans. p. 374.)

It was testified that there was no nearest available market. (Trans. p. 239.)

It was not claimed that there was any error in this instruction, and if it be now claimed there was, we should be granted the privilege of arguing the question.

There was evidence showing that there was no market at Milwaukee for hops (Trans. pp. 71, 72, 73), and the Court left the determination to the jury.

The rule announced in the opinion is in conflict with the authorities.

> *Salem Iron Co. v. Lake Superior Consol. Iron Mines,* 112 Fed. 239; 50 C. C. A. 213;
> *Redhead Bros. v. Wyoming Cattle Inv. Co.,* — Iowa — 102 N. W. 144, 147.

As to the books showing sales, the Court instructed the jury:

> "You have a right to consider the prices obtained by the plaintiff on such resales in connection with the evidence as tending to establish the *market prices* of such hops at the time of such resales." (Trans. p. 375.)

It is not claimed by anybody that this instruction was erroneous and no exception was taken to it.

The Court in its opinion overlooks the fact that the Pabst Company offered in evidence the portion of the books showing the date of the sales, the number of bales sold and the prices obtained from each sale.

The record shows that Mr. Horst testified to the prices obtained on sales of Cosumnes hops for approximately sixty days after November 4, 1912. (Trans. pp. 76, 77 and 78.)

Whatever criticism might be directed against this testimony, because of the non-production of the books, was waived when the Brewing Company itself introduced the books on this very question of the prices obtained on other sales.

The following is an extract from the cross-examination of witness Lange (Trans. p. 266) :

> "Witness. This book contains the entry of the sales made in the United States after November 4th, 1912, including not only Cosumnes hops, but all the hops sold in Chicago, New York and the San Francisco office.
>
> Mr. Powers. *I offer page in evidence.*"

The extract from the Horst Company's book thus admitted in evidence sets out in detail all sales made from August 21st, 1912, to July 9th, 1913. It included all the sales testified to by Mr. Horst. It also included other sales; for Mr. Horst had testified only to the sales from November to January. As far as

the sales testified to by Mr. Horst were concerned, the books introduced in evidence by the Brewing Company verified and repeated every item of his testimony. (See entries introduced by defendant, Trans. pp. 267, 268.)

By thus introducing the books themselves, showing the very items complained of, the defendant Brewing Company without question waived any objection to the testimony as to the prices obtained.

Jaegel v. Johnson, 148 Cal. 695.

Where incompetent evidence is admitted over objection, and upon cross-examination, the objecting party introduced the same testimony, he is estopped to raise the question of competency upon appeal.

Scott v. Union & Plainters' Bank & Trust Co., 123 Tenn. 258, 130 S. W. 757, 765.

To the same effect is

Rodier v. Life Ins. Co. of Virginia, 32 App. Cas. D. C. 159.

In *Jenkins v. Salem Brick & Lumber Co.,* 45 So. 435, the appellant complained of the admission in evidence of a certain deed. The Court said:

> "Whatever good ground there may have been for the objection, it is answered by the fact that defendant, in order to set up his own chain of title, was driven to the necessity of introducing this very deed in evidence. It disposes of whatever force there may have been in the objection."

Again, in *Cathey v. Missouri Ry. Co.*, 124 S. W. 217, a witness, who was a stationkeeper of a railroad, was allowed by the trial court to read to the jury from an incompetent register, not prepared by him, showing when certain trains passed. The judgment was at first ordered reversed on this ground; but when the court's attention was called to the fact that plaintiff, on cross-examination of witness, caused him to repeat or re-read substantially, if not identically, the same evidence, *a rehearing was granted* and the judgment was affirmed.

As the Pabst Company itself introduced in evidence the pages showing the times of sale and amounts realized, there can be no error in that.

The only other items the books showed were the *expenses of sales.*

While we think these were properly admitted, yet the amount of selling expense is accurately figured. They were:

Storage (Trans. p. 201.)	$ 153.50
Insurance (Trans. p. 204.)	25.98
Freight or tare (Trans. pp. 204-5.)	188.43
Interest (Trans. pp.206-7.)	310.73
Proportionate share of overhead expense (Trans. p. 179.)	4459.30
Uncollectible accounts (Trans. p. 149.)	262.19

If all of these last named items or any one of them was improperly admitted, we hereby offer to allow the judgment to be reduced by such amount.

If the trial court has erroneously instructed the jury as to the measure of damages in a certain particular, and it is apparent that the erroneous assessment under the instruction could not have exceeded a given sum, *the appellate court will affirm the judgment on the condition that plaintiff remit such excess.*

> *Hazard Powder Co. v. Volger,* 58 Fed. 152;
> *Washington v. Harmon,* 147 U. S. 571.

III.

As to the testimony of Chalmers and Treganza.

The Court has unwittingly fallen into error as to what occurred with reference to the testimony of Chalmers and Treganza. This Court says:

> "The testimony thus offered tended strongly to show that the hops were not of choice quality, and the Horst Company was not able to perform its contract with the Brewing Company. The testimony should not have been limited to the quality of the hops contained in the samples, because it was incumbent on the seller to go further and show that the hops actually tendered were equal in quality to the samples furnished in order to show its ability to perform the contract. But if it be conceded that the testimony should have been limited to the quality of the hops contained in the samples, we still think the rejected testimony had a direct tendency to

> corroborate the witnesses who testified that the samples did not exhibit a choice quality of hops for the reason that the hops contained stems and leaves and were not cleanly picked."

The Court is under a misapprehension as to this testimony.

The only testimony rejected was hearsay testimony, and even to this plaintiff withdrew all objections and asked that Mr. Chalmers and Mr. Treganza be allowed to testify, and defendant declined to put the testimony in.

It is our contention that on the theory on which the case was tried in the court below, that the defendant was not justified in repudiating the contract if the plaintiff offered to supply hops equal to the samples submitted by the defendant. Such hops could have been secured any where. But conceding that they had to be secured from the plaintiff's hop yard, and conceding that it could be shown without identification that on a certain day hops were being picked that were not clean, *such testimony was given.* The testimony excluded was *hearsay evidence* of a man on the ranch, and even to this plaintiff waived its objection.

This Court in its opinion quotes from the transcript on page 300. But immediately following the matter quoted by this Court the record shows that the *testimony was given.* The only testimony excluded was *hearsay.* The record shows the following:

"The COURT. Now, Mr. Powers, if this witness will testify that he knows that they were the hops that are now in controversy here, the identical hops, I will let him testify. You have got to prove that they are the identical hops, otherwise it is wholly immaterial.

Mr. POWERS. We will connect it with the testimony of Mr. Horst himself. Mr. Horst has testified that all of the hops were baled in one lot.

Mr. POWERS. (Q.) At this time, while you were there, were the hops of the season of 1912 being baled?

A. Yes. They were running them from the kiln over to the cooler before they were baled.

Q. That was all going on simultaneously?

Q. What operations were going on at the hop-house at the Horst ranch while you were there?

A. They were picking, drying and baling too.

Q. Explain to the jury what the processes were on the ground, from the green hops to the picker and so forth.

A. There is no man under the sun who could swear that they were the same hop, only the man that shipped the hops.

Mr. POWERS. Q. These were hops on the Cosumnes ranch of Mr. Horst?

The COURT. State what you saw at Mr. Horst's ranch while they were baling Cosumnes hops.

A. That is picking and all. I went up there just to see the picking machine. It was my first experience with a picking machine. I have picked by hand all my life.

The COURT. Leave out all of that. Tell us what you saw.

A. I went there to see the picking machine run, and it was running. The man who had charge of the picking machine was at the picking end of it and I asked him if I could look through it, and he said 'I will show you.' We went to the back

end where the elevator was taking the leaves into the kiln. They had canvas along there to keep the leaves from going out. The stems and leaves were going into this elevator, and I said to the man, 'Don't you pick out none of the leaves.'

Mr. Powers. (Q.) What did you do about an examination of the kiln?

A. I went up to the kiln, and the hops were powdered up in the kiln where they were drying. They went into the cooler room and there was a man there baling them. They were going into a bale, then they were putting them out on the plains in the boiling hot sun with no cover over them whatever." (Trans, pp. 301-303.)

It is evident that the witness testified to all that he saw. He then was asked to give *hearsay* testimony as to a conversation with a man on the ranch. The record shows the following:

"Q. What was *said to you* by the man in charge with reference to the manner of baling hops, so far as the leaves and twigs were concerned?

Mr. Devlin. I object to that as irrelevant, immaterial, incompetent and *hearsay.*

The Court. The objection is sustained.

Q. What was the condition of the hops in the Cosumnes district with reference to ripeness on or about August 12th, 1912.

A. They were green, too green to pick. They ripened from about the 20th to the 25th of August. There were no hops ready to pick before that.

Q. While you were at the Horst hop house, and seeing the picker at work in the manner in which you state, did the man in charge *say any-*

thing to you about the manner in which he was picking hops so far as leaves and stems were concerned.

Mr. DEVLIN. I object to it as irrelevant, incompetent and immaterial.

The COURT. Objection sustained.

Q. Was anything *said* by the man in charge of the picking machine and the hop house concerning instructions because of certain goods that were to be used to fill an eastern order.

Mr. DEVLIN. I object to this as simply repetition of the same line of testimony."

The only testimony the Court excluded was *hearsay,* as to what a man said without showing that he was authorized by any one to say it.

Now as to Treganza.

The only question asked Treganza was as to a conversation that was *hearsay.* The record shows some preliminary evidence on the part of Treganza, and then that counsel confined the evidence to *hearsay.* The record shows that to make the record clear counsel for the Brewing Company asked this question:

"Mr. POWERS. Did the man in charge of the picker *state* what his instructions were with reference to the manner of handling the leaves and twigs."

This was objected to and the objection was sustained. (Trans. p. 309.) Then Mr. Powers made an offer of what he expected to show by the witness, as follows:

"Mr. POWERS. We offer to show that the plaintiff wilfully made the hops so unclean that it would be impossible for the samples to be in prop-

er condition; that he wilfully included stems and leaves, and said he was doing so because he had to make weight on account of the fact that he had a contract in the east. The testimony is that there was only one contract." (Trans. p. 310.)

The Court said:

The COURT. If you can show anything of that kind, I will let you show it." (Trans. p. 310.)

And then occurs the following:

The COURT. If you can show that the plaintiff stated that, not some man on the ranch, but if you can show that the plaintiff has made a statement of that kind, I will let you show it.

Mr. DEVLIN. I would like to ask if Mr. Powers in good faith intends to prove that Mr. Horst said that, and not some man on the ranch.

Mr. POWERS. Not Mr. Horst personally, but a man in charge of the work for Mr. Horst at that time.

Mr. DEVLIN. That has been ruled on before.

Mr. POWERS. I want to show by the man who was in charge of the property at that time, your Honor. This man was in charge there and represented Mr. Horst at that time.

Mr. DEVLIN. Your Honor has ruled that he may show that Mr. Horst made a statement of that character. He cannot show that somebody else made that statement.

The COURT. The plaintiff is a corporation. Of course, Mr. Horst may be the principal owner, but one employed by a corporation can bind the corporation by his statements, if he is shown to occupy the proper relation. I cannot tell.

Mr. POWERS. (Q.) Will you tell me who you saw at the hop-house at the time you were there in August, 1912.

A. I cannot tell you the man's name.

Q. What was he doing?

A. He had charge of the picking machine.

Q. How many men did he have under him?

Mr. DEVLIN. I object to that on the ground that he does not know that of his own knowledge.

The COURT. (Q.) Do you know anything about who the man was?

A. I do not, only that he had charge of the picking machine. He told me he had. He took me about the house and showed me various places and gave orders to the men about the place. I guess the men obeyed him. They seemed to do the work as he told them. He told them how to take the hop vines down and put them in the picking machine. He had nothing to do with the bales that were outside, but with reference to the drying process he had nothing to do with that. He had charge of the picking machine.

Q. What, if any, was said by the man in charge of the picking machine concerning instructions with reference to the hops that were going into the picking machine?

Mr. DEVLIN. I object to that on the ground that it is irrelevant, incompetent and immaterial and hearsay.

The COURT. Objection sustained.

Mr. POWERS. Exception." (Trans. pp. 310-312.)

The objection occurring on page 309 of the transcript was confined to the call for hearsay evidence. But even if otherwise, the only testimony excluded was hearsay.

Whatever may have been anybody's recollection of what occurred during the trial, of what was stricken out and what remained in the record, the record quoted above accurately states it.

The opinion in this regard is also based on the

mistaken assumption that a tender had been made of specific hops. The opinion contains the following discussion of Chalmers and Treganza testimony: "These rulings were erroneous. It was conceded throughout the trial that the *hops tendered* came from the ranch in question and were picked by a picking machine. The testimony thus offered, tended strongly to show that the hops were not of choice quality and that the Horst Company was not able to perform its contract with the Brewing Company. The testimony should not have been limited to the quality of the hops contained in the samples, because it was incumbent on the seller to go further and show that the *hops actually tendered* were equal in quality to the samples furnished in order to show its ability to perform the contract."

Attention has already been called to the fact that no tender of any hops was ever made, because the Brewing Company repudiated the contract before the parties had reached that stage of performance of the contract. The discussion in the opinion of this testimony is therefore predicated upon the same mistake which influenced the Court's consideration of the question of damages and custom. Since no tender was made, the proffered testimony had no relevancy upon any question before the Court of the quality of any specific hops.

Even that part of the testimony of these witnesses which is discussed in the opinion of this Court (and which was actually admitted), the testimony as to

their observation of the picking machines, was irrelevant and should have been excluded. It did not bear on the ability of the Horst Company to perform the contract, because it was confined to conditions at only one of the two ranches of the Horst Company in the Cosumnes district, and to conditions there only on one day.

The witness Chalmers testifies that he visited the ranch in question "about the last of August or the first of September." (Trans. p. 300.) And the witness Treganza testifies that the visit occurred "in the latter part of August." (Trans. p. 309.)

It also appeared in evidence that the hops in this district were picked by the Horst Company from August 12th to September 7th, the amount picked upon each day being set out specifically on pages 119 and 120 of the transcript.

The conditions attempted to be testified to by these witnesses might have prevailed on any one of the several days during which hops were being picked; but the inference that therefore the same conditions prevailed on every other day of the hop picking season would be exceedingly weak.

Moreover, the particular ranch which was visited by these witnesses was the so-called Murphy ranch. (Trans. p. 371.) This was only one of the two ranches operated by the Horst Company in the Cosumnes district during the year 1912. ("We have a couple of ranches at Cosumnes." Trans. p. 143.)

Certainly the conditions on this particular ranch had no relevancy whatever as tending to show the condition on the other.

Furthermore, evidence of the condition of the Horst hops was irrelevant on the issue of ability to perform because, as already pointed out herein, the Horst Company was not under the contract confined to hops which it had grown, but had the right to procure other hops.

The answer of the defendant alleges that the contract was modified so as to be a contract for the sale of hops corresponding in quality to the four samples sent by it to the Horst Company. (Trans. pp. 29 and 30.) Whether the contract was modified in this respect or not, it is certainly true that after the Brewing Company had submitted samples upon which it agreed to accept delivery, which samples were *not air dried* Cosumnes hops, and which were *not machine picked,* it could not thereafter be heard to say that the Horst Company was unable to perform its contract because of its inability to obtain air dried, machine picked hops. In other words, the tender of samples of kiln dried, hand picked hops by the Brewing Company to the Horst Company, was an unequivocal waiver of their right to insist that the delivery be made of only air dried and machine picked hops. After this act on the part of the defendants, the Horst Company could certainly have procured hops other than those which they themselves had grown, and if the Horst Company had this right, then

the testimony of Chalmers and Treganza was of no value whatever as bearing upon the question of the ability of the Horst Company to comply with its contract.

The opinion concludes the discussion of the Chalmers testimony as follows:

> "But if it be conceded that the testimony be limited to the quality of the hops contained in the samples, we still feel the rejected testimony had a direct tendency to corroborate the witnesses who testified that the samples did not exhibit a choice quality of hops, for the reason that the hops contained stems and leaves and were not cleanly picked."

We respectfully submit that this testimony had no proper bearing upon the quality of the samples for several reasons. In the first place the samples, whose quality was in issue, were not all taken from the Cosumnes district. (Trans. p. 81.) It did not appear in evidence that any one of all the samples submitted came from the Murphy ranch of the Horst Company, which was the only ranch visited by these witnesses. The failure to connect the testimony with any one of the samples, and the absence of any testimony that the samples were drawn from the hops picked at or about the time of the visit, utterly destroys any relevancy that this testimony might otherwise have.

But assuming (contrary to the evidence) that it had been proved that the samples were taken from the specific ranch visited and were taken from spe-

cific bales made up of the hops picked at the time of the witnesses' observations, still the evidence has so little value that it should not be entitled to consideration. It is to be noted that all hops, commercially speaking, contain some leaves and stems and other extraneous matter. And furthermore, that hops are not uniform throughout the bales as to the amount of leaves and stems which they contain. (Trans. p. 122.) Whether there is such a proportionate quantity of extraneous matter that the hop ceases to be choice, is to be determined by a person familiar with the commodity from his observation of it. (Trans. p. 115.) The presence of leaves or stems and the consequent effect of dirty picking can be ascertained by observation and is apparent to the eye. As far as this defect is concerned, it is not in any degree a latent defect.

Under these circumstances the examination of the physical sample is so far superior as evidence of quality to the observation of the picking machine at a previous stage in the production of the hops as to render testimony as to the latter valueless. In other words, a witness examining the actual sample after its being prepared, can tell just what quantity of extraneous matter is contained in the sample. After observation of that fact, he can, if he be an expert, express an opinion as to whether or not there is an undue amount of such extraneous matter. In this case many witnesses were called upon this question. The samples were in court and were examined by

the witnesses, and their testimony was contradictory upon the point. Obviously, it was no help to the Court or the jury that some other witness should come forward without any knowledge of the quality of the actual samples—which was the precise point in issue—and testify that he saw the hops being picked, and that at the time he observed the amount of extraneous matter, and that in his opinion such amount was excessive. His opportunity to observe the proportion of extraneous matter was not nearly as good as that of the witnesses who, in court, examined the samples there produced, and his opinion, especially where it does not appear that the samples were taken from the very hops which he observed being picked, is of such slight value as to throw no light upon the other contradictory testimony.

If the testimony of Chalmers and Treganza had to do with some alleged hidden defect in the samples, which would be more evident at the time of picking, it might be entitled to consideration; but the presence of the leaves and stems could as readily be ascertained, and their proportionate amount far more accurately determined by the examination of the samples actually submitted.

But the exclusion of any of the Chalmers and Treganza testimony was without prejudice to the Brewing Company, because the admitted facts of the case showed that the question of the quality of the samples was immaterial, and that the Brewing Company was in default, whatever their quality.

In the first place it was admitted that at the time of the cancellation of the contract by the Brewing Company, the time allowed for performance had not expired. The Horst Company claims that, by reason of the custom already discussed, the time for performance ran to the 1st of March, 1913. The Pabst Company claims that, by reason of a modification of the contract, the time for delivery extended from October, 1912, to February, 1913. Admittedly, therefore, the Horst Company had, at the time of the cancellation, further time within which to submit samples, if, indeed, the submission of samples was necessary.

It is true that the opinion states that "there is no testimony tending to show that it could at any time tender or deliver hops of a quality superior to the samples." This statement, however, overlooks the fact to which attention has already been called, that the Horst Company was not confined to its own crop, but could go elsewhere and secure other hops of a still higher grade than those represented by the samples. It appears admittedly in evidence that there is a grade of hops higher than "choice," and that this higher grade is known by the trade as "fancy." (Trans. p. 122.) For aught that appears in the record, the Horst Company might have procured fancy hops for delivery to the Brewing Company after the time of cancellation. From the foregoing it follows that all testimony with regard to the quality of the samples, including the testimony of Chalmers and Treganza, was immaterial.

Moreover, it was admitted by the defendant, through its President, Mr. Gustav Pabst, in his deposition in the case, that one of the samples submitted by the Horst Company was "choice." (Trans. p. 326.) This admission absolutely precludes any question as to the quality of the samples.

It is true that the witness Pabst claims that this sample was too small in size, but the defendant Brewing Company is precluded from raising this objection because it rejected the samples on different grounds, and thereby waived this objection. As to this the law is well settled. The Court instructed the jury in this regard as follows:

> "Some question has been made by the defendant in its evidence as to the sufficiency in number and size of the samples submitted by the plaintiff to fairly enable the quality of the hops to be properly passed on. In that regard, as it does not appear that the defendant ever made any objection to the plaintiff on that score, and the latter was left to assume that the samples sent were sufficient in number and size for the purpose for which they are sent, it is now too late for defendant to take advantage of that objection, even if well founded."

The Court's charge to the jury in this regard is well supported by the decisions as will appear from the following cases:

Littlejohn v. Shaw, 53 N. E. 810;
Ginn v. Clark Coal Co., 106 N. W. 867.

Since one of the samples was admitted to be "choice," since the only fault the defendant could find

upon the trial was its size, and since the defendant had already waived this objection by a rejection on other grounds, the Court should have excluded all evidence whatever bearing upon the quality of the samples, and its exclusion of the particular evidence of Chalmers and Treganza upon this question was highly proper.

But even if there was any possible error the Court overlooks the withdrawal of all objections and consent to the introduction of the evidence. The record shows:

> "Mr. DEVLIN. I would like to have Mr. Chalmers brought back here for cross-examination. Yesterday he testified as to a certain conversation, or certain acts being done. We have assembled all of the men that were on the Murphy ranch. They are all in the courtroom here. I want Mr. Chalmers to point out the gentleman he claims he had any conversation with. *I withdraw our objections* that we made to that testimony. I will give them the full chance. I would like to have Mr. Chalmers brought back here for further cross-examination.
>
> Mr. POWERS. I have no objection to it at all. I have no more control over Mr. Chalmers than you have.
>
> The COURT. I suppose he went away thinking that you were through with him.
>
> Mr. BUTLER. I think I can get him.
>
> Mr. POWERS. Do you want Mr. Treganza also?
>
> Mr. DEVLIN. Yes." (Trans. pp. 312-313.)

This cured all possible objection.

Error in excluding evidence is cured by a season-

able withdrawal of the objection on which it was ruled out.

38 Cyc., citing many cases.
Kahn v. Trust Etc. Co., 139 Cal. 346;
Mitchell v. Davis, 23 Cal. 384;
Estate of Ross, 50 Cal. Dec. 304.

The above covers the only points mentioned in the opinion, save that as to air-dried hops. On this point, as the opinion says:

> "This ruling is of little moment, because no testimony of any consequence was excluded by reason thereof,"

and such was the fact.

IV.

Opinion as law of the case on retrial.

It is most important to defendant in error that the opinion be opened for reargument if, as has been pointed out, an erroneous rule of damages has been stated in the opinion of this Court, or improper rules of evidence announced, or if questions not made were decided, or if it has intimated incorrectly that Horst Company was unable to make delivery of the hops according to contract. For while *obiter* might not be taken as the law of the case on retrial, it may embarrass the lower court.

3 Cyc. 494;
Barney v. Winona & St. P. R. Co., 117 U. S. 228,

and a matter ruled on as important for purposes of a new trial and passed on for that purpose, though not essential to a decision, becomes the law of the case.

> *3 Cyc.* 494, citing
> *Table Mountain Co. v. Stranahan,* 21 Cal. 548;
> *Poag v. McDonald,* Fed. Cas. No. 11238,

and an opinion passing on unnecessary questions is entitled to great weight.

> *Produce Bank v. Morton,* 42 N. Y. Super Ct. 472;

See also

> *Huttenmeier v. Albro,* 2 Bosw. (N. Y.) 546.

The opinion of this Court ought not to contain expressions which the trial court might deem to be conclusive on it where such expressions may affect questions of law or fact in the case which the judgment on error did not reach. Such questions ought to be left open for the new trial.

PETITION.

The defendant in error respectfully petitions for a rehearing and reargument. If the Court, however, should not grant that, it respectfully petitions:

1. That the judgment be affirmed on condition that the defendant in error remit the selling expense.
2. That the opinion be modified by striking out

that portion relating to the rule for damages, or that damages should be computed as of November 4, 1912, rather than of the time allowed for performance.

Respectfully submitted,

DEVLIN & DEVLIN,
W. H. CARLIN,
MAURICE E. HARRISON,
Attorneys for Defendant in Error.

Dated, March 18th, 1916.

CERTIFICATE.

We hereby certify that, in our judgment, and in the judgment of each of us, the above and foregoing petition for rehearing is well founded, and that it is not interposed for delay.

Dated, March , 1916.

W. H. CARLIN,
MAURICE E. HARRISON,
DEVLIN & DEVLIN,

Attorneys and Counsel for Defendant in Error.

I, Robert T. Devlin, of counsel for the defendant in error herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

ROBERT T. DEVLIN.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PABST BREWING COMPANY, a Corporation,

Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY, a Corporation,

Defendant in Error.

Plaintiff in Error's Statement of Facts Concerning Record in Opposition to Petition for Rehearing.

HELLER, POWERS & EHRMAN,
Attorneys for Plaintiff in Error.

Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

THE JAMES H. BARRY CO.

" to this plaintiff withdrew all objections and asked " that Mr. Chalmers and Mr. Traganza be allowed " to testify, and defendant declined to put the testi- " mony in."

The record shows that this last statement is not the fact.

The first day witness Chalmers appeared the Court struck out the whole of his testimony concerning "picking." The next day the following occurred, viz:

> "MR. DEVLIN—I would like Mr. Chalmers brought back for cross-examination. Yesterday he testified as to certain conversations, or certain acts being done. . . . I withdraw our objections that we made to that testimony. I will give them the full chance. I would like to have Mr. Chalmers brought back here for further cross-examination.
>
> "MR. POWERS—I have no objection to it at all. I have no more control over Mr. Chalmers than you have.
>
> "THE COURT—I suppose he went away thinking that you were through with him.
>
> "MR. BUTLER—I think I can get him.
>
> "MR. POWERS—Do you want Mr. Traganza also?
>
> "MR. DEVLIN—Yes."

Thereafter both witnesses were brought back and (at page 363) the record shows Mr. Chalmers was recalled and then testified amongst other things the following:

> "The picking machine strips them right off. The leaves and stems were going up into the kiln. You could not see many hops. There were no leaves or stems being thrown out by the machine

at all, that I saw. What we call the drum was standing still. It was not running. The vines are pulled right through lengthwise and no leaves and stems are stripped off the best they can. What did not pull off they had a man outside picking them off, and they left the rest on, and a little stems, leaves and so forth went in with the hops. The biggest stems were not sent up with the hops. They did not grind the vines up. The man said that they had orders to let everything go up in the kiln. That they had a cheap contract and the blower was stopped."

The Court then ruled:

"All this will have to go out. The witness has shown that he does not know anything about it."

The witness was then asked the question:

"Q. Do you know about the relative time that hops usually ripen?

"THE COURT—I cannot permit you to go into that.

"MR. BUTLER—Exception."

The Court subsequently said:

"THE COURT—This evidence should not be permitted to stand. It is absolutely indefinite.

"MR. DEVLIN—It is stricken out, your Honor.

"THE COURT—Yes.

"MR. BUTLER—Exception.

"MR. POWERS—Your Honor has stricken out the conversation. How about the witness seeing the physical fact of the leaves going in?

"THE COURT—I am striking out the whole

of it. There is nothing to connect it with the plaintiff.

"MR. BUTLER—We offer to prove by Mr. Traganza the same facts concerning the picking conditions that have been testified to by this witness.

THE COURT—I make the same ruling. Exception."

That the Court struck out all of the Chalmers and Traganza testimony is also shown by the record at pages 366-367, reading as follows:

"During the argument Mr. Powers referred to the testimony of witness Chalmers with reference to the green condition on which plaintiff's hops were picked in 1912."

Thereupon Mr. Devlin interrupted as follows:

"That testimony was stricken out. Counsel is now referring to testimony that your Honor has stricken out.

"MR. POWERS—Mr. Chalmers testified yesterday with reference to the fact that the hops were picked twenty days earlier. That has not been stricken out.

"THE COURT—All of his testimony went out.

"MR. POWERS—Including that about the picking?

"THE COURT—Yes, it was wholly irrelevant. The question is: What was the quality of these hops when they were tendered to the defendant?

"MR. POWERS—Exception."

Certainly the testimony of Chalmers which is herein quoted is not hearsay testimony. Certainly the statement that witness actually saw hop vines pulled right

through lengthwise and that no leaves or stems were stripped off, and the statement that the little stems, twigs and leaves went in the bales with the hops, is not hearsay testimony.

The testimony given by Chalmers prior to the time that the Court made the ruling to strike it all out, included the following (page 303):

> "Q. What was the condition of the hops in the Cosumnes District with reference to ripeness on or about August 12th, 1912?
>
> "A. They were green. Too green to pick. They ripen from about the 20th to 25th of August. There were no hops ready to pick before that."

This was certainly not hearsay testimony.

Mr. Horst had testified (page 119) that from August 12th to August 20th, hops aggregating 751,206 pounds had been picked on his Cosumnes Ranch.

Consequently this witness, who had been growing hops in the Cosumnes District for over thirty years (page 300), whose ranch was about eight miles from the ranch in question, testified not on hearsay but after observation to the greenness of the hops and that the hops he saw being picked with the machine so out of order that it didn't remove leaves and stems which were "going into the bales and they were putting them out in the plains in the boiling hot sun with no cover over them whatever."

This was on the Murphy ranch, which was one of the two Horst Cosumnes ranches.

Mr. Horst had already testified that all the hops from all the ranches were practically the same in character and quality, as follows (page 105):

> "With the exception of 150 bales, all the rest of the bales are of equal grade. They were all choice grade, every bale. One bale was substantially as good as the other."

The witness had already testified that 150 bales, called "pick-ups," were practically refuse hops of an admittedly inferior quality which had no connection with the hops intended for Pabst Co. Hence whatever happened to establish the grade of the Murphy Ranch product was establishing the same grade of choiceness as to the other ranch product.

The ruling of the Court refusing the Chalmers testimony prevented counsel attempting to present any facts about the other ranch.

Again at page 35, counsel say: "The only question that was asked Traganza was as to the conversation that was hearsay."

The record shows this not the fact.

The record shows while the witness was answering the preliminary questions, the following incidents happened (page 309):

> "MR. DEVLIN—I object to this testimony as evidently in line with the previous testimony of Mr. Chalmers. I object to it as irrelevant, incompetent and immaterial.
>
> "THE COURT—Is it to the same purpose?
>
> "MR. POWERS—Yes.

"THE COURT—Objection sustained.
"MR. POWERS—Exception.
"MR. POWERS—So I may make the record clear.
"THE COURT—You say it is the same as Mr. Chalmers' testimony. You have your exception to that.
"MR. POWERS—All right."

After Mr. Chalmers was recalled and testified that he was at the ranch for two and one-half hours with Mr. Traganza and that no leaves or stems were stripped off the vines and that the picking machine was not working effectively, and after the Court had said concerning Mr. Chalmers' testimony, "I am striking out the whole of it. There is nothing to connect it with the plaintiff" (foot of page 364), the record following an exception taken by Mr. Powers reads as follows (page 365):

"MR. BUTLER—We offer to prove by Mr. Traganza the same facts concerning the picking conditions that have been testified to by this witness.
"THE COURT—I make the same ruling. Exception."

It will be seen, too, that Mr. Horst testified (page 105):

"It took about three or four weeks to pick about 4500 bales. We used a machine. We started in picking the ripest first, then went along and by the time we got them picked, the hops were no riper at the end than the hops we started to pick at the beginning. . . . The conditions being the same

on our land as the conditions on other people's land, our hops ripen substantially as other people's ripen."

Again at page 106:

"Q. Did you ever know of a crop of hops picked on anybody else's land of over 4500 bales where the crop was uniform in quality throughout, before?

"A. Why, yes. . . .

"Yes, a crop may be uniform in quality. Simply the skill in picking and drying them makes uniformity in quality."

SECOND: AS TO THE HOPS HORST WAS ABLE TO TENDER.

At page 38, counsel say "attention has already been " called to the fact that no tender of any hops was " ever made because The Brewing Company repudi- " ated the contract before the parties had reached that " stage of performance of contract. The discussion in " the opinion of this testimony is therefore predicated " upon the same mistake which influenced the Court's " consideration of the question of damages and cus- "tom."

The facts are, Horst testified (page 366) with reference to November 4th, 1912, as follows:

"Q. On that date if the defendant was willing to accept, were you able, ready and willing to deliver the 2000 bales hops equal in quality to samples 21, 22, 23 and 24?

"MR. POWERS—I object to that on the same ground.

"THE COURT—Objection overruled.
"A. Yes.
"MR. POWERS—Q. Where were these hops?
"A. They were in that 3042 bales, an accounting of which we have given you."

The 3042 bales referred to were air dried Cosumnes hops manufactured by himself and were represented by samples 1 to 20, which were taken from the bales which were being picked at the time Chalmers and Traganza saw the picking machine at work.

This matter was discussed in our opening brief at pages 172 to 175.

THIRD: AS TO DEFENDANT HORST COMPANY'S RIGHT TO BUY OTHER COSUMNES HOPS TO FILL CONTRACTS.

At page 40, counsel say "the tender of kiln-dried " hops by Pabst to Horst was a waiver of their right " to insist that delivery be made of only air dried " hops," and then they add, "After this act on the part " of the defendant, the Horst Company could certainly " have procured hops other than those which they " themselves had grown, and if the Horst Company " had this right, then the testimony of Chalmers and " Traganza was of no value whatever as bearing upon " the question of the ability of the Horst Company to " comply with its contract."

No one but the Horst people themselves had ever questioned the right of the Horst Company to pro-

cure any Cosumnes hops equal to samples 21 to 24 to fill their contract.

However, as they did not have such hops on hand on November 4th, 1912, this question is purely academic.

It was the duty of the Horst Company from and after the breach on November 4th, 1912, to minimize the damages as much as possible. Nothing could be gained by their going through the idle process of buying hops to tender on this contract, because the ruling of the Court is that they would be entitled to damages in the difference between the selling price and the market price prevailing at the time or soon thereafter.

If the Horst Company had gone out and bought other hops to fill this contract it would not have changed the rule of damages at all. It would of course have been compelled to pay the market price referred to in the opinion of Judge Rudkin, to-wit: the market price on November 4th, or soon thereafter; and Horst would have then tendered them at Milwaukee, and then the damages would have been the difference between the contract price and the price thus paid, plus expense of carriage to point of delivery.

In other words, they would have actually incurred the expense which is one of the factors in determining the damages which Judge Rudkin says they are entitled to without incurring this expense.

Consequently the discussion of the question as to their right to fill the contract by purchasing other hops

is of no value to the solution of the question involved here.

FOURTH: AS TO THE CLAIM OF TIME OF DELIVERY BY PABST CO.

Counsel say (page 44): "The Pabst Company claim " that, by reason of a modification of the contract, the " time for delivery extended from October, 1912, to " February, 1913. Admittedly therefore the Horst " Company had at the time of the cancellation further " time to submit samples, if indeed the submission of " samples was necessary."

The record shows this not to be a fact.

The only foundation for this claim is that Pabst Company in its answer while setting forth the several steps which led up to the final binding contract alleges that at one transition stage there was a modification of the then inchoate agreement to include delivery till February, 1913, because of the acceptance of a letter on Horst's part, which acceptance Horst denied. The next clause of the answer alleges that this inchoate agreement was superseded by another and further agreement, to-wit: the sample agreement on which the Pabst Company relied. These allegations setting up the sample agreement appear in the answer at page 29, as follows: That

> "thereafter (referring to the modification last hereinbefore referred to) the plaintiff in writing offered the defendant to modify any contract which

might have been entered into between the plaintiff and defendant by the telegraphic offers and acceptances as aforesaid, in the following respect, that is to say: The plaintiff in writing offered defendant that if defendant would submit to the plaintiff samples of choice Cosumnes hops grown in the State of California in the year 1912, of such character and quality as the defendant would be willing to accept, the plaintiff would procure and sell and deliver to the defendant two thousand bales of choice Cosumnes hops equal in all respects to the samples so to be presented and submitted by the defendant to the plaintiff; that the defendant accepted the last mentioned offer and did in accordance with said acceptance present and submit to the plaintiff samples of choice Cosumnes hops which it had procured elsewhere, and informed plaintiff in writing that it would be willing to accept and purchase and pay for two thousand bales of choice Cosumnes hops from the defendant if the same were in all things equal in quality to the samples so submitted by defendant to plaintiff."

Moreover the counter-claim set forth in the answer specifically states what the position of the Pabst Company was, namely, that Horst had contracted to sell and Pabst had contracted to buy 2000 bales of Cosumnes hops equal in all respects to samples to be presented and submitted by Pabst.

During the trial at the time Pabst's first witness was introduced, counsel announced to the Court (page 93) that their theory of the case was that there was a modification of the contract and that the contract did not require Horst to furnish air dried hops, but that the contract had been modified.

The exact terms of the modified contract was set forth in the instruction requested by Pabst, which was rejected, which rejected instruction is set forth in extenso at page 22 of our brief, and the position taken by Pabst Company during the trial of the case was that taken by them on the argument as set forth in the brief at pages 22 to 26.

Never at any time during the trial of the case did Pabst Company claim that there was an actual existing modification of the contract which included delivery to February, 1913.

Pabst position was that there was no such provision in existence at any time after the telegrams of October 23rd, 1912, from Pabst, and the letter from Horst of October 29th, 1912, accepting the proposition.

FIFTH: AS TO THE BOOKS AND SELLING PRICE.

Counsel say at page 28, "the record shows that Mr. " Horst testified to the prices obtained on sales of Co- " sumnes hops for approximately sixty days after November 4, 1912."

This is not the fact.

Mr. Horst testified to what his bookkeeping expert reported to him as having been reported by the salesmen in Chicago and New York to be the prices obtained for Horst's peculiar air-dried Cosumnes hops during that time.

Neither Mr. Horst nor any other witness testified

as to what the market price for Cosumnes hops of the character of samples 21 to 24 or of any other hops was at the several places where the hops were sold on the dates of sale.

In fact we can go further because the record shows that no witness testified as to the market price of any Cosumnes hops anywhere at the dates and places the sales were claimed to have been made by Horst's agents.

At page 29, counsel say, "By thus introducing the " books themselves, showing the very items complained " of, the defendant Brewing Company without ques- " tion waived any objection to the testimony as to the " prices obtained."

The Pabst Company did not introduce any books.

While cross-examining witness Lange in order to prove that the testimony which had been given by him was not in accordance with the items used by him, one page of the sales book was introduced on the last day of the trial, but the other books were not available and were not introduced.

This testimony was not introduced to prove any fact on behalf of Pabst Company but to contradict the testimony of Horst's bookkeeping assistant himself.

At page 41 of our opening brief, we explained the effect of this particular page of testimony.

It was not introduced by us for the purpose of showing sales and it did not show sales and it was hearsay

evidence. It was simply introduced to show the error in Lange's testimony in making his compilations.

The rule in such cases is not that referred to by counsel as is shown by his own quotation in case of *Jenkins* v. *Salem Brick & Lumber Co.*, 45 So., 435, where the Court said:

> "When the defendant in order to set up his own chain of title, was driven to the necessity of introducing this very deed in evidence," he waived objection.

Certainly this is an entirely different matter from the introduction during cross examination of testimony to contradict the witness who used the book, especially where the other books were not available to defendant. The testimony was not in any way used to prove Pabst's claim of title or any other fact to establish Pabst's case, except in the negative way of disproving Horst's case. The page of the book was introdued solely for the purpose of showing the flimsy character of the data from which the witness was testifying and not as evidence of the facts it contained.

SIXTH: AS TO OFFER TO REDUCE JUDGMENT BY SELLING EXPENSE.

We have shown at pages 57 to 74 of our opening brief, that all the testimony as to prices, expenses and overhead was hearsay evidence and that the entire stream of testimony was made turbid and impossible for use because of the impossibility of determining the

accuracy of the facts reported by third parties to the witnesses. The idea of purifying such a stream of testimony by omitting such of the errors as were evident is like purifying a chemical mixture by filtering out so much of the solid matter as had not been dissolved prior to the time of the filtering.

The characteristics of the solid matter had already been absorbed by the liquid before the filtering became possible.

The foundation of Horst's case is so interwoven with all this hearsay evidence that it is impossible to alleviate the damage by segregating any part of it.

The very foundation of the sale price as proven was merely the compilation of reports made by third parties to another party without the proof of the market price or the conditions surrounding the sales at the time the sales were made.

This is shown in our brief, pages 74 to 79.

SEVENTH: AS TO THERE BEING NO MARKET PRICE FOR A LOT OF HOPS AS LARGE AS TWO THOUSAND BALES.

The only testimony quoted on this subject is that of Witness Horst.

At page 167 of our brief we call the Court's attention to the evidence of three other witnesses:

One man, Koch, testified that he was seeking to purchase 1000 bales Cosumnes from 17 to 17½ cents a pound in November, 1912. Another man, Sweeney,

actually paid 18¾ cents a pound for 1500 bales of Cosumnes hops in November, 1912. Another man, Drescher, said he was selling Cosumnes hops in November, 1912, from 17 to 19 cents and that the market would take 2000 bales in six weeks, and at 16 cents would take them inside of a week.

It must be apparent that hops are the same as anything else. If cut up in comparatively small lots or if the price was lowered ½ a cent or one cent a pound they could have been sold within what Judge Rudkin calls soon after November 4, 1912.

The idea that the 2000 bales could not be sold at Sacramento or at Milwaukee, or any other place in the United States that has telegraphic communications with brewers, is absurd. Moreover, it is against the evidence.

EIGHTH: AS TO THE RULE OF DAMAGES BEING IN CONFLICT WITH AUTHORITIES.

The pleadings themselves show that Horst Company intended to rely upon the rule laid down by Judge Rudkin at the time the suit was brought. As is shown by their complaint set forth at page 2.

The same rule is that which was invoked by Horst himself in his letter tendered as a compromise on October 28, 1912, when he said:

> "As you will not take the 2000 bales of hops sold you on quality equal to any of the 20 samples

we sent you, nor commit yourselves to take any hops equal to the four samples you sent us, we feel the fair plan that should be most suitable to you will be to agree upon a difference in price to be paid us on the 2000 bales.

"To arrive at that amount, we should get, if market had not changed, the fair profit as between simultaneous buying and selling prices, and as market has declined we should get in addition, the decline in the market, but if you think that this is asking too much we are ready to accept, subject to our confirmation within three business days after receipt of your reply, whatever may be the difference between the contract price and any figure you may offer us now on 2000 bales 1912 hops equal to the four samples you sent us, or to the selection of the 20 we sent you."

Now the only twenty samples sent them were the samples 1 to 20 which were drawn from their own air dried Cosumnes hops and which were the same hops as were referred to in Mr. Horst's testimony herein quoted as being part of the 3042 bales available for delivery on November 4th.

It is admitted that Horst did not set aside any portion of those 3042 bales to Pabst; that he did not carry them as Pabst hops; that he did not sell them as Pabst hops.

The present theory as set forth in Horst's petition is based upon the fact that the final contract was only made to deliver hops equal to samples 21 to 24.

This being so the argument made by us at pages 133 to 137 of our brief is unanswerable.

The case of *Krebs Hop Co.* v. *Livesly,* 114 Pa., 944-

949, practically lays down the same rule as that enunciated by Judge Rudkin in this case.

In this case there was no attempt to prove that Horst had any hops on hand equal to samples 21 to 24, save and except hops of the character of samples 1 to 20 raised by him (pages 365-366).

These samples were never submitted to the Pabst Co., as a compliance with the final contract requiring hops to be equal to samples 21 to 24.

The rejection having taken place on November 4th, and breach accepted by Horst on the next day it became the duty of the Horst Co. to minimize their damages as much as possible from then on.

Consequently all the discussion with reference to custom is purely academic because as they did not have the goods on hand at that time (except their own air dried product which was not tendered) the fluctuations of the market after November 4th in no way affected the principle laid down in the decision in this case, because it would have been their duty to protect themselves by the sale within a reasonable time after the rejection of any hops they then had or subsequently purchased for delivery on this contract.

Moreover, the attempt to inject the element of custom has no evidence to substantiate it. Horst's testimony was practically abandoned by him on cross-examination and all other witnesses testified there was no such custom.

The evidence in this regard was analyzed and speci-

fied at pages 86 to 88 and 169 and 170 of our Brief.

If as a matter of fact these air dried Cosumnes hops were as good as any other hops they could of course have had the benefit of the market within a reasonable time after the breach.

The authorities and text writer quoted by counsel do not refer to conditions like those in this case.

The vital facts in the Livesly case are more nearly like those here. Consequently the measure of damages in the case at bar following the rule of the Livesly decision is as laid down in the opinion in this case.

Counsel find great difficulty in giving unity or consistency to their argument.

They say at page 8, "defendant in submitting sam-"ples of hops which it would accept did not confine "itself to hops grown by plaintiff Company, but agreed "to accept any hops equal in quality to the samples "submitted."

This is an acceptance by them of the theory which was attempted to be established by Pabst Company in their proposed finding which was rejected and which is set forth *in extenso* in our opening brief at page 22.

The acceptance of this sample theory as the existing contract between plaintiff and defendant completely eliminates the existence of any agreement as to date of delivery because the data establishing this contract consists of a series of night lettergrams and letters set forth at pages 65, 66, 67 and 69. Nowhere is date of delivery mentioned therein. In the first telegram

Horst Company ask Pabst Company if they will accept deliveries equal to the four samples received by them, saying they would try to purchase the same if Pabst Co. would accept, and adding by a telegram the next day, "if you wire you will accept hops equal samples "you sent we will arrange accumulate such hops for "you." This was replied to by Pabst Company saying, "must see samples Cosumnes deliveries you can make "equal four samples mailed you as we expect to dispose "of same on coast." This was followed by a letter from Pabst to Horst under date of October 23rd, saying:

> "There was no specified time mentioned when hops were to be shipped, and the entailed loss you have had up to the present time by holding these hops had nothing to do with this deal whatever. If you could have delivered choice Cosumnes equal to the four samples mailed you we would have accepted the same."

This was followed on October 29th by a letter from Horst to Pabst in which they say, "Received your favor "of the 23rd inst. By special delivery mail we send "you to-day a line of samples numbers 25 to 38 inclu- "sive, equal to which we are ready to make deliveries "to you" (page 325).

The Court will thus observe that the contract referred to by them with reference to submission of samples as set forth at page 6 and page 8 of their petition, has no connection whatsoever with any previous negotiations containing provision as to time of de-

livery, and the Pabst people in their letter of October 23rd, specifically set forth that no specified time was mentioned when the hops were to be delivered and the Horst people when they sent the samples to close the modified contract did not dispute that fact.

Certainly, therefore, there was nothing in the contract itself as finally closed which would modify the ordinary rules with reference to damages being determined at the date of the breach or a reasonable time thereafter.

NINTH: AS TO PABST COMPANY HAVING DIFFERENT THEORY FROM THE RULE LAID DOWN IN THE OPINION.

We certainly announced that theory by the first question we asked witness Horst on cross-examination.

We, as counsel for Pabst, spent 5 pages of our opening brief trying to state it.

It is very difficult to understand how counsel can overlook the argument set forth in our brief at pages 132 to 137. It is still more difficult to understand how counsel can overlook the fact that practically the very first question asked Witness Horst on cross-examination was

> Q. What steps, if any, did you take to set aside the 2000 bales for the Pabst people at that time?

The intent of this question was to show that Horst

had abandoned the right to prove the sale price of any hops by failing to set aside hops for Pabst.

We have compiled in our opening brief the several questions that were based upon the theory that all evidence as to sale price of any particular 2000 bales was inadmissible because not ear marked with anything indicating that they belonged to Pabst Company.

At page 81 of our brief we show that they (Horst Co.) did not have 2000 bales on hand. And we add at page 84: "It is our contention that it is error to es-"tablish damages by means of proof of which an un-"defined 2000 bales of hops which did not exist as an "entity were sold for by testimony as to sale price of "hops used in filling contracts in existence on Novem-"ber 4, 1912," etc.

At pages 84, 85 and 86 we collate the several exceptions to overruling objections to questions based on attempt to prove damages by sale price of an unidentified 2000 bales—which was the negative way (and the only way available to Pabst) to attempt to establish the rule laid down by this Court in this decision.

We respectfully submit that the record itself when taken as a whole abundantly and amply justifies the decision now on file in this case and that the rule laid down herein as to damages is in exact accord with not only the Federal but the State decisions on facts as shown by the entire record.

We respectfully request that the petition for rehearing be denied.

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